IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs, April 2, 2007

ANTHONY ROBERTSON v. SHERIFF NORMAN LEWIS, CPT. TACKETT, LT. ARMSTRONG, SGT. WYNNE

Direct Appeal from the Circuit Court for Montgomery County
No. 50401194 Hon. Ross H. Hicks, Circuit Judge

No. M2005-02373-COA-R3-CV - Filed on April 27, 2007

Plaintiff's action alleged his civil rights were violated because he was required to wear a "red uniform because he was black" while he was incarcerated. The Trial Court granted defendants summary judgment. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Anthony Robertson, Clarksville, Tennessee, *pro se.*

Mark Nolan, Clarksville, Tennessee, for Appellees.

OPINION

In this action the plaintiff, an inmate, filed a *pro se* Complaint against Sheriff Norman Lewis, Cpt. Tackett, Lt. Armstrong, and Sgt. Wynne, charging that his civil rights pursuant to 42 U.S.C. §1983, had been violated by defendants while he was incarcerated at the Montgomery County Jail, in that he was placed in a red uniform instead of the customary orange one worn by most inmates, and this was due to the fact that he was black. He sought an injunction ordering that he be placed in an orange uniform and sought monetary damages. He also attached his grievance documents, wherein the hearing officer stated that he had been declared a "risk" based on "current

and past conduct".

Defendants Answered, averring that when plaintiff was booked into the Montgomery County Jail, "a check of the NCIC computer logs indicated that plaintiff was a flight risk and a multi-state offender who had absconded from Illinois and Tennessee." Further, that plaintiff was placed in the red jumpsuit because he was a flight risk, and that his race was no factor in that decision.

Defendants filed for Summary Judgment, and an affidavit of Sgt. Loretta Wynne, who stated that when Robertson was incarcerated the factors they considered in determining whether an inmate was a flight risk were 1) prior criminal history (especially violent crimes), 2) past violations of probation, 3) out of state arrests, 4) sex offender status, 5)NCIC database records, and 6) any other behavioral factors which may indicate the inmate is a flight risk. She stated that neither race, gender, sexual preference, nor any other personal traits factored into this determination.

She stated that with regard to Robertson specifically, she investigated and found out that NCIC had already determined him to be a flight risk, so she placed him in a red uniform, and that the decision to declare a prisoner a flight risk was essential to prison security/discipline.

Defendants also filed the affidavit of Cpt. Doug Tackett, which corroborated Wynne's affidavit. In Defendants' Motion for Summary Judgment, they asserted that plaintiff failed to show a municipal policy or custom which resulted in a violation of his rights, and that they had acted in their official capacities, and had qualified immunity. They also filed a Statement of Undisputed Material Facts in support of their motion.

The Trial Court granted Defendants' Motion for Summary Judgment, stating that plaintiff failed to respond to the Motion for Summary Judgment as required by Tenn. R. Civ. P. 56, failed to respond to the Statement of Undisputed Material Facts, and that summary judgment should be granted.

Plaintiff filed a Motion for Extension of Time, asking the Court for more time to respond, asserting that his failure to respond was due to excusable neglect. He filed an unsworn statement in support of this Motion, stating that he did not have an understanding of "the summary judgment rules" and instead of filing affidavits, he subpoenaed witnesses for a hearing. Plaintiff appealed, and we summarize the issues on appeal:

1. Whether there was a genuine issue of material fact for trial?

2. Whether the Trial Court erred by "not giving understandable prejudgment notice . . . of the requirements of the summary judgment rules, to include the necessity of submitting affidavits if the facts are in dispute"?

3. Whether the Trial Court erred by refusing to allow plaintiff to attend the summary judgment hearing?

Plaintiff argues that there were genuine issues of material fact warranting a trial, although he does not specify what issues of fact he contends exist. In this regard, the Supreme Court has said:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment ... shall be entered against him." Rule 56.05.

Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993).

Defendants affidavits demonstrate that no discrimination took place, and plaintiff failed to file any response. Thus, the Trial Court correctly entered summary judgment against plaintiff, as there was no genuine issue of material facts presented.

Plaintiff further argues that as a *pro se* litigant, he was not given understandable prejudgment notice of the requirements of the summary judgment rules, which he argues is required by case law. While it is true numerous federal circuits have adopted such a requirement, the Sixth Circuit has not definitively done so. *See Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975); *Moore v. Florida*, 703 F.2d 516 (11th Cir. 1983); *Hudson v. Hardy*, 412 F.2d 1091 (D.C.Cir. 1968); *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992); *but see Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988). However, plaintiff has pointed to no Tennessee authorities adopting such a requirement. We have found no Tennessee authority listing such a requirement regarding *pro se* prisoner litigants. *See Teaster v. Tenn. Dept. of Corrections*, 1998 WL 195963 (Tenn. Ct. App. April 24, 1998).

Assuming *arguendo* such notice was required, defendants point out that plaintiff was given this information, by virtue of their explanation of the summary judgment procedure contained in their Memorandum of Law in Support of their Motion for Summary Judgment. Our review of these documents demonstrate that defendants explained the summary judgment procedure and the requirement that plaintiff come forward with affidavits or discovery materials in response to a properly-supported summary judgment motion. This issue we hold is without merit.

Finally, plaintiff argues the Trial Court erred in refusing to order his attendance at the summary judgment hearing. While inmates have a constitutional right to initiate and prosecute a civil action, they do not have an absolute right to be present at each stage of the proceedings. *Logan v. Winstead*, 23 S.W.3d 297 (Tenn. 2000). The decision of whether or not to have the inmate present at a hearing is within the trial court's discretion. *Id.* In this case, however, plaintiff did not request to be brought to the hearing until after the summary judgment had been granted. This issue is likewise without merit.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to the plaintiff, Anthony Robertson.

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HERSCHEL PICKENS FRANKS, P.J.